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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 615

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,

Respondents.

No. 686

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; SILVIO GUTIERREZ; and NAPOLEON DUPOUY,

Respondents.

MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS BY GENERAL MARCOS PEREZ JIMENEZ

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 77

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,

Respondents.

No. 688

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; SILVIO GUTIERREZ; and NAPOLEON DUPOUY,

Respondents.

MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS BY GENERAL MARCOS PEREZ JIMENEZ

GENERAL MARCOS PEREZ JIMENEZ, by and through his undersigned counsel, moves this Honorable Court to grant him leave to appear as amicus curiae in the above-styled proceedings.

These matters originated collateral to a complaint for extradition of GENERAL MARCOS PEREZ JIMENEZ, filed by MANUEL ARISTEGUIETA, the petitioner (plaintiff), in the United States District Court for the Southern District of Florida, Miami Division, on August 24, 1959. Connected with the extradition matter, the petitioner, MANUEL ARISTEGUIETA, has endeavored by various means to seek the production of bank records and accounts of the defendant, MARCOS PEREZ JIMENEZ, and other persons, including friends and family of the defendant, for the purpose of discovery and alleged possible use in connection with the extradition proceedings. In the first endeavor to secure the records, subpoenas duces tecum were issued by the extradition judge in Miami, requiring the respondent banks to appear in the Florida District Court and produce certain documents dealing with the accounts of the individuals named. THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION, THE ROYAL BANK OF CANADA and depositors, SILVIO GUTIERREZ, NAPOLEON DUPOUY, PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO, moved to quash the subpoenas and then appealed to the Fifth Circuit Court of Appeals the denial of the motion to quash by the extradition judge. On February 1, 1960, the Court of Appeals for the Fifth Circuit took jurisdiction of the appeal and in a per curiam decision held that the order denying the motion to quash should be vacated and the subpoenas quashed. The Court in its order stated:

> "The Court decides that the order denying motions to quash the subpoenas duces tecum is final and appealable." *Note No. 1

The petitioner, MANUEL ARISTEGUIETA, then filed a petition for writ of certiorari to the Supreme Court of the United States, which petition was granted and the hearing set for the fall term of 1961 (case No. 77). Thereafter the plaintiff in the extradition case, MANUEL ARISTEGUIETA, endeavored to obtain the same bank

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*Note No. 1—*Aristeguieta v. Jimenez*, 5th Cir. 1960, 274 F2 206.

records by alternate means and secured from the Honorable William C. Mathes an order granting leave to take depositions of the same banks under Rule 26 of the Federal Rules of Civil Procedure. Subpoenas pursuant to said order were issued by a judge of the District Court for the Southern District of New York. THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION, THE ROYAL BANK OF CANADA and depositors SILVIO GUTIERREZ and NAPOLEON DUPOUY moved to quash the subpoenas and then appealed the order denying the motion to quash to the Circuit Court of Appeals for the Second Circuit. On December 30, 1960, the United States Court of Appeals for the Second Circuit reversed the decision of the court below and ordered the subpoenas quashed. The petitioner, MANUEL ARISTEGUIETA, has filed a petition for writ of certiorari which has been granted by the Supreme Court (case No. 688), and the case consolidated with the writ of certiorari originating in the Court of Appeals for the Fifth Circuit. Both matters have been jointly set for hearing in the fall term (cases No. 77 and No. 688).

The defendant below, MARCOS PEREZ JIMENEZ, participated in opposition only in the matter relating to the order of Judge Mathes, permitting the taking of depositions for discovery purposes, and chose rather than to move for the quashing of the subpoenas in New York to pursue an alternate method of filing a motion for a protective order, seeking to prohibit the taking of the depositions. An appeal was taken to the United States Court of Appeals for the Fifth Circuit from the order denying the motion for protective order. On April 25, 1961, the Court of Appeals for the Fifth Circuit dismissed the appeal and ordered:

> "This Court has jurisdiction of appeals 'from all final decisions of the district courts of the United States' in this Circuit, and from certain 'interlocutory orders of the district courts of the United States.' No statute, however, gives this Court jurisdiction of an appeal from an order, whether interlocutory or final, of a magistrate in

an extradition proceeding. For lack of jurisdiction, therefore, the attempted appeal is dismissed." (Case No. 18408, United States Court of Appeals, Fifth Circuit)

It would appear that the Court's decision regarding its jurisdiction conflicts with its earlier decision. *Note No. 1

The Court of Appeals for the Fifth Circuit observed in its opinion that the Supreme Court had granted certiorari to review the prior decisions of both the Fifth Circuit and the Second Circuit and that most of the disputed questions of law would probably be settled on such review.

The present posture of the extradition proceedings is that both the plaintiff and the defendant have presented their evidence and that the plaintiff has been ordered to present his rebuttal evidence on June 12, 1961. The petitioner, MANUEL ARISTEGUIETA, in the extradition proceedings has represented that he has rested his case subject to a motion to reopen in the event the ruling of the Supreme Court should make the bank records available. The only factor that prevented the defendant, MARCOS PEREZ JIMENEZ, in participating actively in case No. 683 heretofore was his choice of procedures to pursue his remedies in the Fifth Circuit Court of Appeals rather than the Second Circuit Court of Appeals. The appeal in the second circuit proceeded more rapidly than in the fifth circuit. It is unlikely that a petition for writ of certiorari could be processed in sufficient time to result in a joinder of the cases. Pursuing a petition for writ of certiorari from the decision of the fifth circuit at this point would not only be futile because of the time involved but would be burdensome to the Court and the parties concerned. It would also appear that the interests of the defendant and the Court

*Note No. 1—*Aristeguieta v. Jimenez*, 5th Cir. 1960, 274 F2 206.

would be adequately served under the circumstances by permitting him to file a brief as amicus curiae in the pending appeals before the Supreme Court. The defendant did not participate in the appeal leading to the petition for writ of certiorari in case No. 7 as this case did not involve the use of discovery procedures under the Federal Rules of Civil Procedure, which is the main basis for the defendant's opposition. The defendant, MARCOS PEREZ JIMENEZ, alleges that in addition to his interests in the proceedings before this Court, which are obvious, his participation in the proceedings as amicus curiae is essential to the fair administration of justice for the following reasons:

1. That the petitioner, MANUEL ARISTEGUIETA, has stated in the extradition proceedings that notwithstanding the resting of his case he intends to move for the reopening of the case in the event the United States Supreme Court makes the bank records available for his inspection. The extradition judge has set June 12, 1961, as the date when rebuttal evidence must be submitted and the case concluded. The hearing on the appeals will not take place until the fall term of 1961 in the Supreme Court. In the light of these circumstances, it therefore appears that the issues are moot, or in any event will become moot before a hearing on the merits in the appeals. This question is relevant to proper disposition of the case and is of major interest to the defendant, MARCOS PEREZ JIMENEZ. It does not appear from the record that the question has been adequately presented by the parties.

2. The defendant, GENERAL MARCOS PEREZ JIMENEZ, has placed his major opposition to the proposed depositions on the ground that there is no provision in foreign extradition proceedings for the permitting of discovery depositions under Rule 26 of the Federal Rules of Civil Procedure as investigative aid to the demanding government. On the record of appeal it does not appear that this question which is relevant to a

proper disposition of the case has been adequately presented by the parties in a manner which would protect the best interests of the defendant.

Respectfully submitted,

David W. Walters

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Perez Jimenez

CERTIFICATE AS TO SERVICE OF COPIES OF MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS BY GENERAL MARCOS PEREZ JIMINEZ

STATE OF FLORIDA }
COUNTY OF DADE } ss.

DAVID W. WALTERS, being first duly sworn, on oath deposes and says that he is attorney for Marcos Perez Jimenez; that on the 22 day of June, A. D. 1961, he mailed two (2) copies of motion for leave to appear as amicus curiae in support of the respondents by General Marcos Perez Jimenez to each of the following at their respective addresses:

John A. Wilson, Esquire
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Attorney for Respondent, The First National City Bank of New York

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David W. Walters

David W. Walters

Subscribed and sworn to before me
at Miami, Florida, June 6th, 1961.

A. Neuburger

Notary Public, State of Florida at Large
My Commission Expires Oct. 2, 1961
Bonded by American Surety Co. of N. Y.